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Supreme Court, U.S.
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NO. 02-782

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2002

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JONATHON WALLS,
*Petitioner,*

-vs-

DEMETRIUS HENDERSON,
*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

---

**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

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Respondent
~~Petitioner~~ Demetrius Henderson seeks leave to proceed *in forma pauperis*.

Respondent
~~Petitioner~~ was granted leave to so proceed in both the U.S. District Court and the U.S. Court of Appeals and counsel was appointed for Respondent ~~Petitioner~~ under the Criminal Justice Act of 1964, 18 U.S.C. Sec. 3006. Consequently, pursuant to Rule 39.1, no affidavit is attached.

Alan M. Freedman

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ON PETITION FOR WRIT OF CERTIORARI
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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## I. CERTIORARI SHOULD BE SUMMARILY DENIED WITH RESPECT TO TWO OUT OF THE THREE QUESTIONS PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI BECAUSE THOSE QUESTIONS WERE NOT PROPERLY RAISED IN THE LOWER COURTS AND ARE WITHOUT MERIT

### A. Petitioner's arguments concerning the stage at which arguments were raised in state court concerning the similarities between excluded African-Americans and accepted non-African-Americans are not properly before this Court and, in any event, are without merit

One of the two issues raised in the first "Question Presented" in the Petition for Writ of Certiorari pertains to whether it was appropriate for the Circuit Court of Appeals and the District Court to consider evidence and arguments concerning the similarities between African-Americans who were excluded by the prosecutors and non-African-Americans who were accepted onto the jury, where those arguments were first made to the Illinois Supreme Court.[1] Petitioner argues that, because those arguments were first raised in the Illinois Supreme Court, it was improper for the federal court to consider them in evaluating Defendant's *Batson* claim. *See* Petition for Writ of Certiorari at 15-19. In essence, Petitioner is making a procedural default argument. Petitioner's argument must be rejected for three reasons.

First, Petitioner did not raise this argument in its briefs in the Seventh Circuit but instead waited to do so in a Petition for Rehearing. Petitioner's procedural default arguments, therefore, are not properly before this Court. *Neely v. Eby Construction Co.*, 386 U.S. 317, 330 (1967).

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[1] The first "Question Presented" in the Petition for Writ of Certiorari actually raised two issues: one pertaining to the stage at which arguments concerning the similarities between excluded African-Americans and accepted non-African-Americans and the second pertaining to whether the Seventh Circuit and the District Court were correct when they concluded that it constituted an unreasonable application of *Batson v. Kentucky*, 476 U.S. 79 (1986), for the Illinois Supreme Court to have held that, as a matter of law, such evidence and argument is irrelevant (and therefore not to be considered) during the *prima facie* stage of a *Batson* proceeding. A third question pertaining to whether the *Batson* hearing should be held in State or Federal court is raised by the second "Question Presented." As explained in the text, only the second of these three issues is properly before this Court.

Second, the Illinois Supreme Court itself did not hold that there was any sort of procedural default. Instead, the Illinois Supreme Court refused to consider Defendant's arguments and evidence of the similarities between excluded African-Americans and accepted non-African-Americans because the Illinois Supreme Court believed that, as a matter of law, such arguments and evidence are legally irrelevant at the *prima facie* stage of a *Batson* proceeding. *See Henderson v. Walls*, 296 F.3d 548-49 (7th Cir. 2002). The Illinois Supreme Court's refusal to consider those arguments and evidence was not based in any way on the fact that the arguments concerning that evidence were not raised in the state trial court. Because the Illinois Supreme Court itself did not find that Defendant had procedurally defaulted his argument pertaining to the similarities between the excluded African-Americans and accepted non-African-Americans, Petitioner's procedural default arguments must fail. *Harris v. Reed*, 489 U.S. 255, 264 (1989) ("a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar").

Third, as the Seventh Circuit explained,

> The record of this case comes to us in an unusual posture. The state court record at the trial level was somewhat cryptic regarding the *Batson* challenge, the *Batson* hearing (or lack thereof), and the racial make-up of the venire members both excluded and accepted. The Illinois Supreme Court noted the failure of the trial court to produce a proper record and conducted its own review of the facts regarding the number of challenges exercised by the parties and the races of the venire members challenged by the prosecution. *Henderson*, 568 N.E.2d at 1245. This, in our view, was a decision it was entitled to make. The only consequence for us is that it is the Illinois Supreme Court's own decision and its version of the facts that we now review, since that court chose to disregard the trial court's discussion and to conduct its own detailed review of the record.

*Henderson*, 296 F.3d at 545-46. The Seventh Circuit's description of the state court *Batson* proceedings is accurate. In addition, the approach taken by the Seventh Circuit—of focusing on the Illinois Supreme Court's decision rather than what occurred in the state trial court—was precisely the approach taken by the District Court and by both parties in their briefs in the Seventh Circuit. The fact that the District Court and the parties in their briefs in the Seventh Circuit focused on the Illinois Supreme Court's decision supports the view that the Seventh Circuit's approach was correct. If the Seventh Circuit's (and the District Court's) approach was not correct, then why did Petitioner adopt that very approach in its briefs in the Seventh Circuit? Why did Petitioner not raise in its appeal to the Seventh Circuit the argument that it is making now?

In sum, certiorari should be denied with respect to Petitioner's procedural default argument because Petitioner failed to properly raise it below, the Illinois Supreme did not find that there had been a procedural default and the Seventh Circuit's decision on this point was correct.

**B. Petitioner's arguments concerning where the *Batson* hearing should occur (in state court or in federal court) are not properly before this Court and, in any event, are without merit**

A second issue raised in the Petition for Writ of Certiorari concerns whether it was appropriate for the Seventh Circuit to affirm the District Court decision conditionally granting a writ of habeas corpus unless Petitioner chooses within 120 days of the mandate to seek a *Batson* hearing in state court or should, as Petitioner argues here, the Seventh Circuit have remanded the matter to the District Court for a *Batson* hearing. *See* Petition for Writ of Certiorari at 19-24. As with the first issue discussed above, Petitioner's

arguments in regard to this issue should be summarily denied because they were not properly raised below and, in any event, the Seventh Circuit's decision on this point was correct.

Specifically, Petitioner's sole argument in its briefs in its appeal of the District Court decision regarding the *Batson* issue was that the District Court erred when it concluded that the Illinois Supreme Court's decision involved an unreasonable application of *Batson*. Petitioner did not challenge the District Court's authority to require that the *Batson* hearing be held in state court rather than federal court. Instead, that argument was first made in Petitioner's Petition for Rehearing. Because Petitioner failed to properly raise this issue in the Seventh Circuit, the issue is not properly before this Court and should be summarily denied. *Neely*, 386 U.S. at 330.

Even if Petitioner had not waived this argument by failing to properly raise it below, certiorari should not be granted because federal habeas courts clearly have authority under 28 U.S.C. Section 2243 to "dispose of [habeas corpus petitions] . . . as law and justice require." This Court in *Batson* made clear that *Batson* proceedings should be held in the trial courts where the allegedly discriminatory prosecutorial challenges occurred. Moreover, this Court's habeas decisions have consistently reflected this Court's federalism concerns by creating rules which reflect the primary role that state courts should play in determining whether constitutional rights have been protected. These federalism concerns have become even more heightened in light of Congress' enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Given these federalism concerns, particularly in light of AEDPA, the Seventh Circuit's decision in this case requiring that the *Batson* hearing be held in state rather than federal court was

clearly an appropriate exercise of judicial discretion in fashioning appropriate relief "as law and justice requires."

## II. CERTIORARI SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT WAS CORRECT WHEN IT HELD THAT IT CONSTITUTED AN UNREASONABLE APPLICATION OF *BATSON* FOR THE ILLINOIS SUPREME COURT TO HAVE REFUSED, AS A MATTER OF LAW, TO CONSIDER EVIDENCE AND ARGUMENT PRESENTED BY DEFENDANT OF SIMILARITIES BETWEEN EXCLUDED AFRICAN-AMERICANS AND ACCEPTED NON-AFRICAN-AMERICANS

The only question properly before this Court is whether the Seventh Circuit correctly determined that it constituted an unreasonable application of *Batson* for the Illinois Supreme Court to have refused, as a matter of law, to consider at the *prima facie* stage evidence and argument presented by Defendant of similarities between excluded African-Americans and accepted non-African-Americans. In this regard, the Seventh Circuit stated:

> *Batson* does not provide a checklist of what trial judges should consider in evaluating [peremptory challenges]. Instead, the Supreme Court said more generally that "in deciding whether the defendant has made the requisite showing, the trial court should consider *all* relevant circumstances." [*Batson v. Kentucky*, 476 U.S. 79, 96 (1986]. . . . The issue now before us is whether this precedent from the Supreme Court permits a state court to exclude, at the *prima facie* stage, proffered evidence that compares excluded African-American venire members with the accepted white jurors.
>
> The Illinois Supreme Court determined, as a matter of law, that the comparison of excluded African-American venire members with white jurors was not relevant evidence: "at this stage . . . it is not our role to search . . . for similarities between stricken black and accepted white venire members." [*People v. Henderson*, 568 N.E.2d 1234, 1250 (Ill. 1991).] Perhaps it was not the court's role to "search" for similarities, but in this case, Henderson vehemently requested a comparison analysis and provided the court with all of the relevant characteristics of the excluded and accepted venire members. Declining to search out similarities is far different from refusing to consider, on relevance grounds, evidence of similarities when the defendant presents it. We see nothing in *Batson* that takes such a crabbed view of what might be relevant to the consideration of "all" the circumstances surrounding the exercise of the state's peremptory challenges. . . .

> We conclude that it was an unreasonable application of *Batson* for the Illinois Supreme Court to decline to consider this evidence as part of the *prima facie* determination. As we commented in *Mahaffey* [*v. Page*, 162 F.3d 481 (7th Cir. 1998)], "if an excused African-American had characteristics and opinions that were similar to those of a juror who sat, for example, then an obvious inference . . . would be that the strike was racially motivated." *Id.* at 485. Of course, had Henderson not requested the comparison analysis, and had he not offered the evidence necessary for a proper analysis, a comparison may not have been a "relevant circumstance" for the state court to consider. But Henderson actually made all the arguments and provided all of the evidence necessary to allow the court to conduct the analysis.

*Henderson*, 296 F.3d at 549. The Seventh Circuit's decision was clearly correct: what circumstance could be more relevant to the question of whether African-Americans were excluded on account of their race than evidence showing that white jurors sharing the same opinions and characteristics as the excluded African-Americans were selected to serve on the jury?

Petitioner argues that, because this Court has never been confronted with the specific factual scenario at issue here, and therefore has never specifically held that evidence of similarities between excluded African-American jurors and accepted white jurors is a relevant circumstance in determining whether there is an inference that African-American jurors were excluded on account of their race, there is no "clearly established federal law" as determined by this Court, and so the Illinois Supreme Court's decision refusing as a matter of law to consider such evidence cannot constitute an "unreasonable application clearly established federal law." Petition for Writ of Certiorari at 12-15. However, to paraphrase this Court's analysis of what constitutes "clearly established federal law" in the context of ineffective assistance of counsel claims in *Williams v.* Taylor, 529 U.S. 362, 391 (2000), the fact that the *Batson* "any other relevant circumstances" rule "of necessity requires a case-by-case examination of the evidence [in

evaluating 'any other relevant circumstances' that may be present in a particular case] . . . obviates neither the clarity of the rule not the extent to which the rule must be seen as 'established' by this Court."

In sum, there is clearly established law as determined by this Court governing this case, that law as set forth in *Batson* is that courts must consider "any other relevant circumstances" in assessing whether a *prima facie* case of discrimination exists, and the Illinois Supreme Court unreasonably applied that clearly established federal law when it refused to consider the obviously relevant circumstance that white jurors sharing the same opinions and characteristics as the excluded African-Americans were selected to serve on the jury. This Court should not grant certiorari on this question.

**CONCLUSION**

For the reasons set forth above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Attorney for Demetrius Henderson

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02-782

CERTIFICATE OF SERVICE

I, Alan M. Freedman, certify that I served copies of Petitioner's Motion to Proceed In Forma Pauperis, Brief in Opposition to Petition for Writ of Certiorari and Conditional Cross-Petition for Writ of Certiorari by first class mail, postage prepaid, on December 23, 2002, addressed to:

Renee Goldfarb
Assistant State's Attorney
309 Richard J. Daley Center
Chicago, Illinois 60602

William Browers
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

Alan M. Freedman

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December 23, 2002

Clerk of the United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Dear Clerk of the Court:

Please find enclosed for filing a Motion to Proceed in Forma Pauperis, a Brief in Opposition to Petitioner for Writ of Certiorari in Docket No. 02-782, and a Conditional Cross-Petition for Writ of Certiorari.

Sincerely,

Alan M. Freedman

Alan M. Freedman
Attorney at Law

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